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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 MARK ALLEN,)
10)
11 Petitioner,) CASE NO. C08-928-TSZ-BAT
12)
13 v.)
14)
15 PATRICK GLEBE,) REPORT AND RECOMMENDATION
16)
17 Respondent.)
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28 INTRODUCTION AND SUMMARY CONCLUSION

29 Petitioner is currently in the custody of the Washington Department of Corrections
30 pursuant to a 1997 King County Superior Court judgment and sentence. He has filed a petition for
31 writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from the exceptional sentence
32 imposed following his conviction on a charge of first degree rape. Respondent has filed an answer
33 to petitioner's federal habeas petition in which he argues that the petition is time-barred under the
34 federal statute of limitations, 28 U.S.C. § 2244(d). This Court, having reviewed petitioner's
35 petition, respondent's answer, and the balance of the record, concludes that petitioner's federal
36 habeas petition should be dismissed as untimely.

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1 Washington Supreme Court seeking an extension of time to file a motion for discretionary review.
2 (*Id.*, Ex. 15.) The Supreme Court denied petitioner's motion for an extension of time on March
3 24, 2008, and on June 18, 2008, the Court of Appeals issued a certificate of finality in petitioner's
4 second personal restraint proceedings. (*Id.*, Exs. 16 and 17.)

5 Petitioner signed his federal habeas petition on July 23, 2008, and the petition was
6 received by the Court for filing on July 28, 2008. (*See* Dkt. No. 8.)
7

8 GROUND FOR RELIEF

9 Petitioner identifies three grounds for relief in his federal habeas petition:

- 10 1. During sentencing, the trial court judge imposed an exceptional sentence
11 exceeding Mr. Allen's standard range based on facts not found by the jury
12 nor charged in the indictment nor admitted to by Mr. Allen. The relevant
13 facts to support the enhanced sentence was found solely by the judge.
- 14 2. By the imposition of the exceptional sentence by the trial court it relieved
15 the State of proving beyond a reasonable [doubt] the relevant facts and this
16 violated Mr. Allen's 5th and 6th amendment rights to the [C]onstitution.
- 17 3. Mr. Allen should have received the benefits from the Jones, 526 U.S. 227
18 (1999) decision and In re Winship, 397 U.S. at 363 based on the
19 undebatable [sic] decision of the interpretation of the [C]onstitution by the
20 U.S. Supreme Court when the state of Washington reviewed Mr. Allen's
21 pleadings.

22 (Dkt. No. 8 at 5, 7, and 8.)

23 DISCUSSION

24 On April 24, 1996, the President signed into law the Antiterrorism and Effective Death
25 Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, Sec. 105 (1996), which
26 worked substantial changes in the law of federal post-conviction relief. One of those changes was
to adopt a one-year statute of limitations for § 2254 actions. *See* 28 U.S.C. § 2244(d)(1).

1 Section 2244(d)(1) states that the one year limitations period runs from the latest of:

2 (A) the date on which the judgment became final by the conclusion of direct review
3 or the expiration of the time for seeking such review;

4 (B) the date on which the impediment to filing an application created by State
5 action in violation of the Constitution or laws of the United States is removed, if
6 the applicant was prevented from filing by such State action;

7 (C) the date on which the constitutional right asserted was initially recognized by
8 the Supreme Court, if the right has been newly recognized by the Supreme Court
9 and made retroactively applicable to cases on collateral review; or

10 (D) the date on which the factual predicate of the claim or claims presented could
11 have been discovered through the exercise of due diligence.

12 28 U.S.C. § 2244(d)(1).

13 Petitioner does not appear to dispute that he filed his federal habeas petition more than one
14 year after his judgment and sentence became final. Petitioner appears to argue instead that his
15 petition should be deemed timely because the state courts, by improperly applying clearly
16 established federal law to his claims, impeded his ability to present his claims earlier. (*See* Dkt.
17 No. 8 at 13.) However, the fact that petitioner believes the state courts improperly resolved his
18 claims challenging his exceptional sentence does not constitute the sort of impediment which
19 would justify the application of § 2244(d)(1)(B) to his petition.

20 Assuming, as respondent suggests, that petitioner actually intends to argue that his petition
21 should be deemed timely because he did not have viable grounds upon which to challenge his
22 exceptional sentence prior to the time the United States Supreme Court issued its decision in
23 *Blakely v. Washington*, 542 U.S. 296 (2004), petitioner's argument still must fail because the
24 Supreme Court has not made the rights recognized in *Blakely* "retroactively applicable to cases on
25 collateral review." *See* 28 U.S.C. § 2244(d)(1)(C).
26

1 The record before this Court makes clear that petitioner's federal habeas petition was not
2 timely filed in accordance with the provisions of § 2244(d)(1). The two provisions of §
3 2244(d)(1) discussed above effectively constitute exceptions to the general one-year time limit set
4 forth in
5 § 2244(d)(1)(A). It is clear that neither of those exceptions applies here. The Court must
6 therefore look to the provisions of § 2244(d)(1)(A) to determine whether petitioner's petition was
7 timely filed.
8

9 Petitioner's judgment became final on direct review not later than March 19, 1999. Thus,
10 under § 2244(d)(1)(A), petitioner had until March 19, 2000, to file his federal habeas petition.
11 The one year limitations period is tolled for any properly filed collateral state challenge to the
12 pertinent judgment or claim. 28 U.S.C. § 2244(d)(2). Petitioner did file two collateral state
13 challenges to his judgment and sentence. However, both challenges were filed well after the
14 statute of limitations had already expired. Petitioner's personal restraint proceedings in the state
15 courts therefore would not have acted to toll the statute of limitations. *See Nino v. Galaza*, 183
16 F.3d 1003 (9th Cir. 1999).
17

18 The statute of limitations is also subject to equitable tolling. *Laws v. Lamarque*, 351 F.3d
19 919, 922 (9th Cir. 2003). However, the Ninth Circuit has made clear that equitable tolling is
20 available "only when extraordinary circumstances beyond a prisoner's control make it impossible
21 to file a petition on time and the extraordinary circumstances were the cause of his untimeliness."
22 *Id.* (internal quotation and citation omitted). Petitioner does not argue that he is entitled to
23 equitable tolling of the federal statute of limitations.

24 As noted above, petitioner did not sign his federal habeas petition until July 28, 2008, over
25 eight years after the statute of limitations expired in March 2000. Because petitioner filed his
26 petition outside of the § 2254 statute of limitations period, and because petitioner has not

1 demonstrated that he is entitled to either statutory or equitable tolling of the limitations period, his
2 petition is time-barred.

3 CONCLUSION

4 Based upon the foregoing, this Court recommends that petitioner's federal habeas petition
5 be dismissed, with prejudice, pursuant to 28 U.S.C. § 2244(d). A proposed order accompanies
6 this Report and Recommendation.

7 DATED this 19th day of February, 2009.

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BRIAN A. TSUCHIDA
12 United States Magistrate Judge
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